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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

No. 72

ALLEN C. CLARK AND WIFE, AND BARTOW L. WALKER,
Appellants
v.
JOHN E. ROLLER,
Intervenor, Appellee
} *Upon Original Appeal.*

and

No. 451

JOHN E. ROLLER,
Intervenor, Appellant
v.
ALLEN C. CLARK AND OTHERS,
Appellees
} *Upon a Cross Appeal.*

From the Court of Appeals of the District of Columbia.

Brief and Argument for John E. Roller, Intervenor Appellee in First Case and Appellant in Second Case.

JOHN E. ROLLER,
O. B. ROLLER,
Attorneys for said John E. Roller.

Virginia Printing Corporation, Busy Printers

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FACTS OF THE CASE.

The controversy in this cause, is over original lots numbered eight, (8), nine, (9), and ten, (10), in square No. 1028, in the city of Washington, in the District of Columbia.

The Appellee, John E. Roller, who is appellant in the cross appeal, insists that he is the sole and exclusive owner in fee simple of said lots, and shows that he is in the sole

and exclusive possession of the same, that he acquired the property for value, and without notice of any claims thereto, on the part of any other person whatsoever, about the year 1886, that he has ever since, exercised all the rights of ownership in respect to said property, and has paid all the taxes and assessments against the same, it having been assessed in his name.

It appears that the title under which the said John E. Roller holds the property was originally a tax title, by virtue of which the property in controversy, after having been delinquent from the years 1824, down to the year 1846, was sold after due advertisement thereof, for said delinquent taxes, on the 8th day of December, 1847, to one Richard Barry, to whom, after the expiration of two years, from the date of said sale, the said property not having been redeemed as provided by law, the same was conveyed, by the corporation of the city of Washington, by its mayor, the Honorable Walter Lenox. It further appears, that the said Richard Barry and his widow and heirs, claiming under said tax title, held said property down to the year 1875, when they conveyed it to one William H. Triplett, having paid the taxes on said property during all of the said years, for which they produced the original tax receipts, and that subsequently the said William H. Triplett conveyed the said property to one John S. Irvin, who in turn conveyed the same, to one John Ambler Smith, who again in turn conveyed the same to the appellee, John E. Roller, and that the said Roller, and those under whom he claims, have paid all the taxes, general and special, assessed against the property, and exercised acts of ownership and possession over said premises, for nearly sixty years. It further appears, that the appellee, John E. Roller, believing that the conveyances made by the original proprietors to John M. Gantt and Thomas Beall of George, vested the legal title to all lands in the District of Columbia, in them, as trustees:

First, That they should convey to the Commissioners of the District of Columbia, all lots that were chosen by the Government, or wanted by the Government, for its purposes, either for reservations, or for the buildings of the capitol, the President's house, or any other public building, or for public squares, for the use of the city, or for streets and alleys throughout the city, and:

Second, That they should convey back to the original proprietors, after the Government had taken what it wanted, the residue of the property conveyed to them by the original proprietors as aforesaid; had obtained a conveyance to him from the heirs of Thomas Beall, of George, the survivor of said trustees, of the legal title.

On the other hand, the appellant, Allen C. Clark, claims an interest in said property as alienee of some of the heirs of John Young; and his wife, Sarah P. Clark, was joined with him in the cause below in her right as his wife; while the other appellant, Bartow L. Walker, is the alienee of other heirs and devisees, and their alienees, of the alleged title of the said John Young, it being alleged by them, that one Abraham Young, of the District of Columbia, died about the year 1800, intestate, seized and possessed of the lots in controversy; that he left surviving him as his only heirs at law, four sons, John, Samuel W. Charles, and Richard Young, and two daughters, namely, Susanna Young, who intermarried with John A. Sommers, and Elizabeth Young, who intermarried with one Mahlon Roach; that upon the death of Abraham Young, his real estate in the District of Columbia was partitioned among his children, and these lots, eight, (8), nine, (9) and ten, (10), square 1028, were allotted to his son John Young; that John Young died in the year 1823, unmarried and intestate, leaving as his only heirs at law, his brothers and sisters.

The record shows also that in January, 1893, the said Allen C. Clark, with whom was joined his wife, Sarah P.

Clark, instituted their suit in chancery in the Supreme Court of the District of Columbia, Equity cause, No. 14,468, against numerous parties, heirs at law, of the said John Young, or claiming under said heirs at law, and against the appellant, John E. Roller, in which suit, a partition of said lots eight, (8), nine, (9), and ten, (10), square 1028, among those entitled thereto, was sought, and to that end, a sale was asked to be decreed and made, of said lots, and the money arising from said sale, divided among the parties, according to their respective interests; and as necessary also to that and, it was especially prayed, that the tax title of the defendant, John E. Roller, by virtue of the sale of said property in 1847, as delinquent for the non-payment of taxes, to Richard Barry, as has already been set forth, might be decreed to be null and void, and the conveyances in relation thereto, and in connection therewith delivered up for cancellation, and cancelled, upon the grounds set forth in said bill of complaint, the only ground specifically set forth, and relied upon, in said bill of complaint being the averment that the officer or officers of the said corporation of Washington, professing to sell said lot for taxes, had not within ten days, after the sale thereof, or at any time, transmitted to the clerk of the late circuit court for the District of Columbia, for the county of Washington, a report in writing, certified by the clerk or register of the said corporation, in manner and form as required by section 2, of the act of Congress, approved February the 20th, 1819, nor was such report, or any report in the premises, forthwith, or at any time, recorded by the said clerk, or anyone else, among the land records of said county of Washington. The true title to said lots being clouded by reason of the claim of the said John E. Roller under the tax sale and deeds aforesaid, the said complainants asked to have said sale decreed to be null and void, and said deeds delivered up for cancellation and cancelled and the said cloud to the title of said lots removed.

The defendant, John E. Roller, filed a demurrer to this bill upon the grounds, to wit: First, that the complainants should not be permitted to maintain their bill of complaint against him, until they should have first asserted a title to their undivided interest in said real estate, in a court of law; and, Second, that they should not be permitted to maintain it against him, because they and those under whom they claimed, had been guilty of such *laches*, in the assertion of their claims, as to preclude them from receiving the aid of a court of equity.

The cause was heard upon this demurrer, on the 17th day of June 1893, and the demurrer was sustained, and the bill dismissed as to the said John E. Roller, with costs.

Subsequently, on the 24th of November, 1893, the same complainants instituted their second suit in chancery, in the said Supreme Court of the District of Columbia, Equity cause No. 15,141, against the same parties who were before the court in the first named Equity cause, No. 14,468, or certain privies, to whom, some of the defendants in said cause, had conveyed their interests in said property, but without making the appellant, John E. Roller, a party thereto and expressly avoiding to do so. Whereupon the said Roller, appeared before the court, and upon his petition it was ordered, that he should be made a party defendant, in the new suit, the said order being made by the same judge, (Hagner,) who had sat in, and decided the first named cause, and the complainants having filed a supplemental and amended bill, in which they again averred, that the tax title under which the said John E. Roller claimed title to the property, was null and void, and prayed that the same might be so decreed, and that the conveyances in relation thereto and in connection threwith might be delivered up for cancellation and cancelled, and that the said John E. Roller, and all persons claiming under him, might be forever enjoined, from setting up any claim, under or by virtue, of the said

conveyances, or any of them, the said John E. Roller, appeared to the said original and amended and supplemental bills of complaint, and filed his answer, in which he asserted, that he and those under whom he claimed, had paid all the taxes assessed against the property, and had exercised all RIGHTS OF OWNERSHIP and possession over said premises for nearly half a century; that the complainants and those under whom they claim, upon the other hand, had failed for nearly three- quarters of a century, to pay any attention whatever to the premises, or to the discharge of the obligations resting upon them, to pay the taxes due, and assessed by the Government, under whose protection they stood; that during all this great lapse of time, all of the officials, who might have thrown light upon the transactions involving this property, had long since disappeared from the stage of action; that the witnesses, who could have testified to the regularity of the proceedings, which led up to the sale for taxes, and the conveyance under the tax sale, had died; that the papers andrecords which might have been forthcoming, if any assault had been made upon the tax title, within a reasonable time, had been lost or destroyed by the ravages of time; that even the newspapers in which the sale was advertised, had for the most part fallen into dust, and that the whole transaction, had become so obscure, that it was impossible, for the court to ascertain with certainty and precision, the facts of the case; that in the meantime, the city of Washington had grown in population, and the property in controversy, instead of being a burden, as it had been for long years past, was at last valuable, and worth looking after, and that the complainants spying out from the records, the ancient and abandoned rights of the heirs of John Young, deceased, and desiring to speculate therein, had secured from a few of them, for a paltry consideration, a conveyance of some small interests, in the premises, and had asserted a claim of title, by the suit, while at the same

time they did not set out, how they, and their grantors, came to be so long ignorant of their rights, and how, and when, they had first come to a knowledge of the matters alleged in the bill, nor did they set out, what were the impediments, to an earlier prosecution of their claims.

Upon the issues joined upon this answer, a decree was entered on May the 5th, 1896, declaring that the bill was multifarious as to the defendant, John E. Roller, and that the complainants were *"barred by their own laches from any equitable relief against the defendant, John E. Roller,"* and this second bill of complaint, was dismissed as to him.

Subsequently, however, after the said Roller had been dismissed from the cause, and notwithstanding the fact, that the court had refused to grant any relief to the complaints against the tax deed, and other conveyances under which the said Roller claimed to be the owner of the property, and had refused to decree, that the said deeds should be delivered up and cancelled, the court went on, to appoint commissioners to make a partition of the said lots, assigning one-fifth to the heirs and devisees of James Ward Scott, and after said one-fifth had been so partitioned, and set off, for said heirs of James Ward Scott, to decree a sale of the residue.

No steps, however, were taken under said decree of sale, which bears date the 30th day of June, 1896, until June 1901, when the said property was advertised to be sold under said decree, on the 23rd day of July, 1901, and thereupon the said John E. Roller, having obtained leave to intervene in the cause filed a petition therein, in which he asserted, that he had twice appeared in that court and successfully defended his ownership, of the property aforesaid, the court having twice refused to grant the relief sought by the complainants, and the judge of said court, in the second cause, having expressly declared in the decree itself, that the complainants were barred by their great *laches*

and delay, from any relief in a court of equity against the tax title, under which the said Roller claimed the property in controversy, and to have the tax deed and those made subsequent thereto, and in connection with it,, cancelled and annulled, and in which he also averred that the court was without jurisdiction and authority, to enter the subsequent decrees and orders in the cause, and that while these said decrees were in no way binding upon him, he having been dismissed therefrom, they nevertheless tended to throw a cloud upon his title, and to embarrass him in the full use and enjoyment of the property, that a sale under said decree might still further tend to injure him, involving him in litigation, and might mislead also some innocent purchaser. He prayed the court to rehear and set aside all decrees in the cause rendered subsequent to the decree of May 5, 1896, (p. 90 P. R.), and that the cause might be finally dismissed.

The appellees claimed in an answer filed by them, that the trustee could convey a good title to the property, staking the assertion upon the certificate of a certain title and insurance company, which certificate itself showed on its face that the petitioner Roller was in possession of the property, and had gotten George R. Arrington to build a fence around the same for him after he became the owner thereof, and that he had looked after the lots from 1875 to 1887 when he became such owner and had the fence built. They claimed also that they had repeatedly offered to reimburse the said John E. Roller for all taxes and assessments paid by him, upon said land, and that he had refused to accept it, but introduced no proof whatever sustaining any such statement, while the said John E. Roller, on the other hand declared that this statement was absolutely untrue. They averred, also, that the said John E. Roller was not in possession of the property in controversy, but that one Bristow L. Walker was in such possession, under license from Leo. Simmons, the trustee.

The proofs showed that the defendant, John E. Roller, had paid about four thousand dollars ($4,000) on his purchase of the land, in the year 1887, (p62 P. R) that he had fenced the property in controversy that same year, (p. 62 P. R. and p 73, P. R.) and had held it in absolute possession up to the year 1892, when the fences were destroyed by some contractors acting under one John H. Walter, a trustee of the heirs of John Young, deceased, and that while Roller was thus in possession the first named suit was pending and decided. (p. 72, P. R.)

The cause was heard upon the petition of the said John E. Roller, the answer of Allen C. Clark, and Leo Simmons, trustee, and it was decreed by the court on the 6th of November, 1901 (p 110, P. R.), that the prayers of the petition be denied, the petition dismissed, and the rule to show cause, discharged with costs; and further, that the order to the trustee to suspend or postpone the sale of the property, be revoked.

From this decree of the 6th of November, 1904, an appeal was taken by the said John E. Roller, to the court of appeals of the District of Columbia and when the cause was decided by that court on the 4th day of February, 1903, the decree of the court below was reversed, and the cause remanded for such further proceedings in said Supreme Court of the District of Columbia, "in conformity with the opinion and decree of this court, according to right and justice and the laws of the United States ought to be had." The case has been reported and the opinions of the court, both upon the hearing and upon the rehearing are given in full.

The court in its opinion decided that the complainants were not entitled to the relief they sought, towit, the partition of said three lots, because their title thereto was not clear, but said also, as a matter of grace or favor, in a court of equity, that the proper course to be pursued was,

to suspend all proceedings in the suit for partition and give the complainants a reasonable time, to establish their title at law, if they desired so to do, or else to dismiss their bill without prejudice, leaving all parties, to pursue such remedies for the protection of their interests as they might be advised.

Whereupon the appellees, Allen C. Clark and wife, by their solicitor filed their petition to rehear said decreee of the court of appeals with the result that the decree of that court, after due consideration thereof, was affirmed.

From that decree of the court of appeals of the District of Columbia of the 20th of February 1903, neither the appellants nor the appellee, Roller, nor anybody else, has ever taken an appeal to the Supreme Court, of the United States, unless as hereinafter set forth.

When the cause went back to the Supreme Court of the District of Columbit the parties in interest, antagonistic to Roller, other than the devisees of James Ward Scott, filed with the papers what is termed in the record "election of parties in record, &c." Printed Record page 112, and thereby made their election "to stand upon the proceedings already had in the cause as they appear from the entire record of said cause." and the cause coming on to be finally heard, upon the mandate of the court of appeals, and upon this election of the parties in interest, it was adjudged, ordered, and decreed that the original and amended bills of complaint be dismissed, without prejudice, as was directed by the decree of said court of appeals, of the 20th of February, 1903.

Thereupon the complainants, Allen C. Clark and wife, and Bartow L. Walker, noted an appeal, to the supreme court of appeals, of the District of Columbia, the counsel for the appellee Roller, insisting at the time, that there could be no such a thing as an appeal from that decree, for nothing had been done in the cause, except what was done

in exact conformity with the mandate of the court of appeals.

The appeal was allowed, however, and thereupon the appellants sought to add to the former record, the deposition of Bartow L. Walker, and some exhibits, which had been left out of the record, upon the first appeal.

But upon the motion of the appellee, Roller, the deposition aforesaid, and all the other parts of the new record, except the paper No. 8 "election of parties in the record &c.," page 112 of the Printed Record—which was treated by the court, as a declination by the appellants, of the option given them by the court of appeals in its decree, was stricken out, and the decree of the court below, affirmed with costs, on the 24th of May, 1904.

From this decree—of the 24th of May, 1904,—AND NO OTHER—the appellants have sought and were allowed an appeal, to the Supreme Court of the United States.

The contention of the appellants is, that although an appeal was taken by the appellee, John E. Roller, from the decree of November 6, 1901, of the Supreme Court of the District of Columbia, in the case of Allen C. Clark and others, vs. Harriet Osburn & others and although the Court of Appeals of the District of Columbia decided the questions involved in that appeal, upon the record as then made up by the parties in interest after full argument, and careful consideration thereof, upon the merits and remanded the cause to be proceeded in, in accordance with certain directions, given in its opinion and decree, and although nothing was done in the cause, thereafter, except to dismiss the same, as required by the decree of the court of appeals, yet as that appeal had been taken from an interlocutory decree, it had in fact decided nothing, and a second appeal could be taken to the court of appeals of the District of Columbia, and then from that court to the Supreme Court

of the United States and the further contention is, that the decision and decree of the Court of Appeals of the District of Columbia, on the first appeal, is to be regarded as of no value whatever, but that the entire record can be brought up for review, on appeal for the second time, in the cause by the party who lost upon the first appeal, and that appellants can avail themselves of any error which they may find in any of the proceedings in the cause.

In view of all these contentions of the appellants, the appellee, John E. Roller, has sought and perfected, a cross appeal, so that any errors in the case, to his prejudice, may be corrected upon such cross appeal.

ASSIGNMENTS OF ERROR UPON THE CROSS APPEAL.

1. The court below erred, in not holding in positive terms, that the decrees rendered by the Supreme Court of the District of Columbia in favor of the appellant John E. Roller, the one by Judge Hagner, on the 17th of May, 1893, in Equity Cause No. 14,468, and the other by Judge Cox, on the 5th of May, 1896, in Equity Cause No. 15,141, adjudicated the title of said Roller, to the property in controversy, finally and irrevocably, and in not declaring by its decree, that these were final decrees, upon that question, as to him.

2. The court below erred in not holding that said prior decrees, did not finally adjudicate the title of said Roller, to the property in controversy, and that there could be

no further, or new contention, in regard to the same, and in failing to recite such findings, in its decree, and in leaving, the effect of these decrees, to be determined, in a new controversy, to be thereafter instituted.

While the court of appeals, granted the appellant John E. Roller, relief, which must result inevitably, in a judgment in his favor, under the decrees aforesaid, rendered by Judges Hagner, and Cox, respectively both of whom declared that the complainants were not entitled to relief, as against the tax title, held by the said John E. Roller, yet the Court of Appeals of the District of Columbia failed to declare this to be the fact in the cause before the Court, as it should have done, but referred the cause back, with instructions to give the complainants a reasonable time in which to establish their title at law, and if they should decline to do this, then to dismiss the cause, leaving all parties to pursue such remedies for the protection of their respective interests, as they might be advised.

3. The court below erred in failing to annul, all proceedings had, in the Supreme Court of the District of Columbia, subsequent to the decree rendered by Judge Cox, on the 5th day of May, 1896, and in failing to dismiss the cause, finally, from the docket.

PRELIMINARY MATTERS.

1. FIRST PRELIMINARY MATTER—The appellee, Roller, moved the court of appeals of the District of Columbia, to strike out of the record, the deposition of Bartow L. Walker—pages 13 to 28 of the Printed Record—being pages 14 to 37 of the original transcript—and it will appear in this transcript of the record from that court—pages 119 and 120 of the Printed Record,—that this motion was sustained, and that the said deposition, was stricken from the record.

It will be noted, that this deposition in the printed petition or motion, made by Mr. D. S. Mackall, as attorney for the appellee, Roller—as shown on page 116 of the Printed Record—is by mistake, called, the deposition of "John H. Walter," but the pages of the record, referred to, namely: pages 14 to 37 inclusive,—show what deposition is meant by the court, in its order striking out the same. The printed transcript of the record, in the case, when in the court of appeals of the District of Columbia, will also show, that the deposition of Bartow L. Walker, was not in that transcript, and the object of Roller's motion before that court, was, to make the record the same, that it was, when the cause was heard before it, on this first appeal.

This deposition, therefore, although copied into, and printed in the record is—as the record shows—properly no part of the record, to be considered by the court.

2. SECOND PRELIMINARY MATTER—Then first comes a most important question.

The appellants having sought and obtained an appeal to the Supreme Court of the United States, from the decree of the 24th of May, 1904—as the appeal order itself shows—on page 120 Printed Record—*does that have the effect of bringing up the entire record from the beginning for review? If it does*, then the correctness of the decree of the

of appeals, is before this court for review, not only, upon the appeal of the appellant, Allan C. Clark, and wife and Bartow L. Walker, upon the first case, before the court but upon the cross appeal of John E. Roller in the second case before this cuort.

IF IT DOES NOT, then the appeal only relates to the proceedings subsequent to the decree of the court of appeals, of the District of Columbia, of the 20th of February 1903, and the decree of the 24th of May, 1904, must be affirmed, in all respects, as simply carrying into effect, the mandate of the court, under its decree of the 20th of February, 1903.

These appeals to this court, are taken and allowed, under the provisions of section 233, of the Code of the District of Columbia which provides that

"any final judgment, or decree, of the court of appeals, may be re-examined, and affirmed, reversed, or modified, by the Supreme Court of the United States, upon writ of rror, or appeal, in all cases in which the mater in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations, as existed in cases of writs of error, on judgments, or appeals, from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety three."

Under trhe old statutes, the case of Spaulding v. Mason, 161, U. S. Rep. page 375, arose, and it was held, that if the first decree reviewed by the general term on an appeal, was merely an interlocutory one, then upon a second appeal from the final decree, of the general term, the whole record was brought up for review. The court refers among other decisions, to that of the District of Columbia vs. McBlair 124 U. S., p. 320 and an examination of that case will show that it was made to turn, upon the question whether or not, the decree of the general term, was *"final,"* in its charac-

ter, "*upon the rights of the parties, to some relief,*" which is practically what the new statute prescribes.

In McFarland vs. Brown 187, U. S. p. 245-6, it is held, "that a judgment or decree, to be final, within the meaning of that term, as used in the acts of Congress, giving this court jurisdiction, on appeals and writs of error, must terminate the litigation between the parties, on *the merits of the case,* so that if there should be an affirmance here, the court below would have nothing to do, but to execute the judgment, or decree, it had already rendered." Bostwick v. Brinkerhoff, 106 U. S. 3.

It will be necessary therefore to inquire as to what is the character of the decree of the 20th of February, 1903 —whether or not, it was a final decree, and whether or not, it was one from which the parties dissatisfied therewith, should have applied without delay, for an appeal, to the Supreme Court of the United States.

First, can the appellants, Allen C. Clark, and wife, and Bartow L. Walker, now take an appeal from the decree of May 24th, 1904, after having allowed the decree of February 20th, 1903, to stand without an appeal therefrom, for more than two years?

Second. Can the appellee, Roller, take a cross appeal from that decree of February 20,1903, to the Supreme Court of the United States—if that court did not grant him the relief to the extent, to which, as he contended, they should have gone?

It is certain, that he could have taken an appeal at any time, within the two years, but not having done so, can he now take a cross appeal, from that decree.

It is submitted that the Court of Appeals of the District of Columbia by said decree of February 20, 1903, in effect, decided the cause "upon the merits" as to the rights of the parties to relief, for it held in accordance with the decisions of this court, and especially that made

in the case of Willard vs. Willard 145 U. S. Rep. p. 120, that only those tenants in common, whose title is clear, may have partition as a matter of right, so that he may hold and enjoy, his property, severally. It held in effect that the title of the complainants, to the lots in controversy was not clear, and that they were not entitled to have a partition of the same, and while it permitted them, as a matter of grace, to suspend all proceedings, in the suit for partition, and gave them a reasonable time in which to establish their title, at law, yet it declared that if they did not choose to do this the suit for a partition should be dismissed.

As was said by the same court, in Farrow v. Bicycle Co. 18th Appeal Cases D. C., p. "the litigation had become res adjudicata and it was no longer competent for the lower court, to reopen it, for the purpose of amendment of the pleadings, introduction of new testimony, or for any other purpose. The authorities are believed to be unanimous on this point. We need only refer to the decisions of the Supreme Court of the United States in regard to it. Stewart vs. Salamon 87 U. S. 331; Humphrey v. Baker 103 U. S. 736 Southard v. Russell, 16 How. 547; Small v. Mitchel, 143 U. S. 99; In re Washington & Georgetown R. R. Co. 140 U. S. 91 Hickman v. Fort Scott, 141 U. S. 415."

As has already been seen—from that decree of the court of appeals of the District of Columbia, of the 20th of February, 1903 neither the appellants nor the appellee, Roller, nor anybody else, ever took an appeal to the Supreme court of the United States. On the contrary, when the case came up in the Supreme Court of the District of Columbia, the appellants in the present appeal made their election, "to stand upon the proceedings had in the cause,

as they appear from the entire record in said cause," and there upon, the cause coming on to be heard, upon the former record and this "election," the original and amended bills of complaint, were dismissed without prejudice, as directed by the decree, of the Court of Appeals.

There upon the complainants, Allen C. Clark and wife, and Bartow L. Walker, noted an appeal, to the Supreme Court of appeals of the District of Columbia, the counsel for the appellee, Roller, objecting to the allowance of any such appeal, and when the second appeal came before the court of appeals, the court declared that the final decree then appealed from had been entered "in direct accord with the mandate of this court." and upon simple motion, affirmed the same, upon that ground.

In Humphreys vs. Baker 103, U. S., Rep. p. 736, your honors, court after citing Stewart v. Salamon 97 . U. S. p. 361 in a case like the one before the court held as follows:

> "The decree entered below, in the present case, followed the mandate in every particular, and was in legal effect, *ours*. It commanded Humphrey to convey, and the proceedings in which the order now appealed from was entered were for the purpose of compelling him to do what we said must be done. Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the Circuit Court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express directions and may with propriety be considered part of our decree. It was the appropriate way of getting the conveyance which we said must be made. If in the end, it shall appear that Humphrey is entitled to the relief he asks, in what he denom-

inates his "bill of supplement and review," the appropriate decree to that end will be made in that proceeding. *The decree we directed is the final decree in the original suit, and the court below had nothing to do but to carry it into execution."*

It must first be determined then, whether or not the decree of the 20th of May, 1903 which was entered in the court of appeals of the District of Columbia, upon the first appeal, was a final decree of that court.

In connection with this question it should be noted, that upon the first appeal to that court, the parties plaintiff and defendant, selected such parts of the record to be copied, as they desired, and omitted having certain other parts of the record copied and brought before that court, and that the court acted upon the record as thus made up before it. It further appears that by consent of parties, another part of said record in the lower court, was made a part of the record in the court of appeals and the cause reheard upon this *new record.* If the appellants Allen C. Clark and wife and Bartow L. Walker can now take a second appeal, in the case, it is submitted that they cannot have a third and wholly different record made up and, have the court of appeals try the case anew upon this third record? The court of appeals, of the District of Columbia, after allowing them to supplement the original record, on a rehearing has decided, that they cannot make a new record and it is earnestly submitted that this decision is right and just, in every sense of the word, and it is submitted most strenuously also in conclusion on this point—that they are BOUND BY THE DECREE OF THE COURT OF APPEALS OF FEBRUARY 20th, 1903, AS REHEARD AND REAFFIRMED ON THE 6th OF MAY, 1903, AS A FINAL DECREE, FROM WHICH THEY COULD NOT ESCAPE, IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA, WHEN THE CASE WENT BACK TO THAT COURT, AND FROM WHICH THEY COULD NOT TAKE A SECOND APPEAL TO THE COURT OF APPEALS. BUT FROM WHICH THEY COULD ONLY HAVE TAKEN AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Upon this view of the matter—the time for the appeal to this court from that of February 20th, 1903 having expired—the motion is made to affirm the decree of the 24th of May, 1904 as a matter of course.

ARGUMENT UPON THE LAW AND THE FACTS OF THE CASE.

I.

It is submitted to the court, that the decrees rendered in favor of the appellee, John E. Roller, the one by Judge Hagner, on the 17th day of May, 1893, and the other by Judge Cox on the 5th of May 1896 are final decrees, and that under the authority of Philips vs. Negley, 117, U. S. Rep. 665, and the hundreds of cases cited in 17 Amer. Encyc. of Law, p. 816, they can not be reviewed, reversed, or annulled for any errors of law or fact, on the part of the court which rendered them and the court of appeals of the District should have upheld and enforced these decrees in the present suit, and not have sent them over to a new suit or controversy for trial.

Perhaps the most eloquent statement of the rule, is to be found in the case of Crane vs. Blum, 56 Tex. Rep. 330, in which it is declared, that—

> "The good of society, and the preservation of right, and of good order, require that, when once the rights of parties have been determin-

ed, by the ultimate tribunal, provided by law, for their adjudication, the same should pass from the field of strife forever. Any other rule would fill the courts with causes, which had once been determined, and render all rights of property uncertain, and the most solemn judgments, a mockery."

The rule as laid down in this court—the Supreme Court of the United States,—is as follows:

"The general principle announced in numerous cases, is, that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies, and even if the second suit is for a different cause of action, the right, question, or fact, once so determined, must as between the same parties, or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded, by the very object, for which civil courts have been established, which is to secure the peace and repose of society, by the settlement of matters capable of judicial determination. Its enforcement, is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked, if conclusiveness did not attend the judgment of such tribunals, in respect of all matters, properly put in issue, and actually determined by them."

See Mitchell vs. Bank, 183, U. S. 480.
S. P. R. R. Co., vs. U. S., 168, U. S. 48. and the numerous authorities cited.

II.

It is submitted also, that it is shown by the record, that not only was the defence of *laches* and abandonment, as against the assault made upon the tax title of the appellant, John E. Roller, presented to Judge Hagner in Equity cause No. 14,468 of Clark and Osburn and sustained by him in that cause, but that it was presented to Judge Cox in Equity cause No. 15,141, in which cause the present appeal is pending; and sustained by him in that cause also.

First. In Equity cause No. 14,468, the bill distinctly assailed the tax title of the apellee, John Roller, upon the ground that it was invalid and worthless because of certain defects charged in the bill, the only defect alleged however, being the failure of the officer conducting the sale for delinquent taxes, to return a report of the sale to the clerk's office of the Circuit court of the county of Washington, and the failure of the clerk of that court to record the same. The defendant, the said John E. Roller, filed a demurrer to the bill, upon two grounds, the first being that a suit for partition ought not to be maintained until the claimants of the property seeking the parition, *had made their title clear*, by an action at law, and the second, that the claimants of the property had been guilty of such *laches* and delay—more than a half a century—in making their attack upon the tax deed, under which the said Roller claimed, as to preclude them from relief.

That the defence of *laches* can be made by demurrer to a bill, has been settled by the case of Camack vs. Carpenter, 22 Wash. Law Rep. pp. 302-304.

The decree rendered by the court on the 17th of June, 1893,—now over twelve years ago—is general in its terms, sustaining the demurrer dismissing the bill and awarding the defendant Roller his costs.

This decree of Judge Hagner, of June the 17th, 1893,

was plead in the new cause No. 15,141, in bar of the prosecution of that suit, and it was proven distinctly and clearly by the testimony of the appellee John E. Roller as well as by that of his attorney, Douglas S. Mackall, that Judge Hagner based his decree, upon both grounds set up in the demurrer, sustaining the demurrer in both branches, but especially resting his decree upon the defense of *laches* presented by the second ground of demurrer. NO WITNESS ATTEMPTED TO CONTRADICT THIS TESTIMONY IN THE SLIGHTEST PARTICULAR.

The record shows, too, that when the appellee John E. Roller, wished to raise this question of *res adjudicata*, his answer was filed before and his petition to be made a defendant for the purpose of making this defense, was presented to the same Judge, (Hagner), who had rendered the decree, and that that Judge required, that the said Roller should be made a party defendant, in the second cause.

Your honors cannot doubt, therefore, that the question was presented to Judge Hagner,, and that by his decree of June 17, 1893, he decided it.

SECOND. In Equity cause No. 15,141, the amended bill made the same attack upon the tax title that was made in Equity cause No. 14,468, and the answer of the defendant, John E. Roller made the same defense, to wit: that of *laches* and the further defense of *res adjudicata*, based upon Judge Hagner's decree.

The decree of Judge Cox shows on its face not only that he decided it, but that he put it in his decree, first, that the court was without jurisdiction to entertain the suit against Roller; second that the bill was multifarious as to him; and third that the complainants were barred by their own *laches* from any equitable relief against the said defendant, and dismissed the said Roller, finally, from the cause.

It is submitted, therefore, that there cannot be a shadow

of a doubt that the question of the defense against the attack made upon the validity of the tax tittle held by the defendant John E. Roller, based upon the ground of *laches*, was sustained by the court, in both of the equity causes, No. 14,468, and No. 15,141, and that there can be no escape from this fact.

III.

As to the Effect of These Decrees.

In the case of Samuels vs. Reviere, 108 Fed. Rep. 718, the plea of *res adjudicata* was sustained in a case almost identical with that before the court. Reviere had filed his bill of equity against Samuels to cancell the deed made by the sheriff under which Samuels claimed the land. A decree was entered cancelling the deed. After the decree was entered, Samuels appealed and the decree of the lower court was reversed, and the cause remanded with instructions to dismiss the bill. When the question came up before the court as to the effect of this decree, the court said:

> "If the decree of the Circuit Court, cancelling the deed had not been reversed, it would have ended Samuel's claim to the land. It would have been as to him, in this case, *res adjudicata*, settling the invalidity of his deed to the land. The case having resulted, finally the other way, and the bill having been dismissed on the merits, it would seem just, that the decree should be equally conclusive as against Reviere that the deed was valid. It is unquestionably a general rule, that at law, or in equity, a judgment or decree is conclusive between the parties upon the matters determined. The contention of Reviere, however, is that the matter in reference to the

homestead was not determined because he did not put it in issue. The rule is that when a suit is brought for a specific purpose, as for example, a bill in equity to remove cloud from title, by cancelling an adversary conveyance—the plaintiff must assert in his cause of action, all grounds, upon which he claims, that the deed he is attacking is invalid. He must present his entire case. The decree is as conclusive, as to those matters which he should present, and withholds, as it is against those actually presented."

Citing—

Freem, on Judg. (4th Ed) 249.
Case vs. Beauregard, 101, U. S., Rep. 688.
Beloit vs. Morgan, 7 Wallace, 622, etc.

In Beloit vs. Morgan, 7 Wall, Rep. 622, it was said in speaking of the former suit, whose decree was plead as *res adjudicata*:

"The parties were identical and the title involved is the same. All the objections taken in the cause, might have been taken in that. The judgment of the court might have been invoked, upon each of them. The court had jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of the case, but as to all further litigation touching the same subject matter, though the *res* itself be different. The principle reaches further. It extends not only to questions of fact and law, which were decided in the former suit, but also to the grounds of recovery or defense, which might have been and were not presented."

The court quotes with approval from the important case of Henderson vs. Henderson, 3 Hare, page 45, the opinion of the court to the effect that the plea of *res adjudicata* applies to every point—not only to those, upon which the parties required the court to form an opinion, and to pronounce a judgment—but to every one, which the parties exercising due diligence, might have brought forward.

In the case of Bailey vs. Laws, 23 S. W. Rep. page 20, 3 Texas Civil App. page 529, itwas held that where in a suit *for partition certain parties were held to have no title,* it was not error to exclude as evidence in a subsequent suit, certain tax deeds, executed prior to such original judgment, under which one of the defeated parties thereto claimed title.

In Heffner vs. Insurance Co., 123, U. S. p. 747, in a case very much like that before the court, it was held, not only, that multifariousness in the bill does not render the decree void, but it was held also, that although, in decrees for foreclosure of mortgages, the holders of prior adverse titles are not proper parties, some of the judges holding that "they could not be made parties" and some holding that "their titles could not be litigated" yet that such adverse claimant, might be made a party, to the cause, and the court might determine the validity of his title, and a decree in such case, was a conclusive adjudication, of which the adverse claimant, could not complain, in any collateral proceeding.

To the like effect, is the decision of the Court of Appeals of West Virginia in the case of St. Lawrence Boom & Mfg. Co. vs. Holt 41, S. E. Rep. p. 751.

THESE CASES ARE IDENTICAL WITH THE CASE BEFORE THE COURT AND THEY SHOW CONCLUSIVELY THAT THE TWO DECREES REFERRED TO IN THIS CAUSE ARE NOT OPEN TO COLLATER-

AL ATTACK, BUT ARE FOREVER BINDING UPON ALL PARTIES IN INTEREST.

Upon these authorities it is certainly clear that if the parties to the two Equity causes Nos. 14,468, and 15,141, adverse to the tax title of John E. Roller, had succeeded in having the tax sale held invalid, and in having the tax deed and all others connected therewith delivered up and cancelled, as constituting a mere cloud upon their title the said Roller would have been forever concluded thereby.

That a court of equity had jurisdiction to cancel the tax sale, and the tax deeds, thereunder, because of its being a cloud on the title, there can be no question (see Samuels vs. Reviere, 108 Fed. Rep. p. 721) and as is said in that case, it would seem but just that the decree should be equally conclusive when the deed has been held valid, as against the other parties in interest. Upon what principle of right, canthe parties, adverse to the interest of the appellee, Roller deny, that they are estopped by the decrees rendered, just as he would have been.

Every action or suit involving the title to land, is in effect an action of trespass to try title, no matter what its form,—see Grimes vs. Hobson, 46 Texas, p. 416—and the judgment of the court is conclusive, even if the court in deciding the question, involved, decides, that it has no jurisdiction, and dismisses the suit. (84 Texas, p. 651.)

It is well settled that a court of equity in a suit to remove a cloud from the title, may bring all the parties before the court—direct that an action at law be brought, or award an issue out of chancery, and make a decree in the cause, binding all parties concerned.

See leading case of Daingerfield vs. Pascal, 20 Texas, 551.

Currin, vs. Spraull, 10 Gratt.

3 Amer. & Eng. Ency. of Law, title, Cloud upon Title.

But if your honors needed additional and perhaps more emphatic authority, you would find it in the decision of the Supreme Court of the United States in the case of Root vs. Woolworth, 150, U. S., 401, a case in which it appeared that Governor Morton had brought a suit against Root to establish his right to certain property near the city of Omaha, and to *have the claim which Root asserted thereto, declared a cloud upon his title.* The decree, established the superiority of Morton's title. Later on, Morton conveyed an undivided half interest in the premises to Woolworth, and the other half to his brother, Morton, and after his death, his executors transferred that half to Woolworth. In the meantime, Root had re-entered, or resumed possession of the premises, and Woolworth filed his bill to carry into execution the decree, which had been rendered in the first suit, in favor of Morton against Root. Root demurred to the bill, on the ground that Woolworth's remedy was at law, and the demurrer was overruled. Then he answered, and attempted to make defense, upon the ground of adverse possession, for the statutory period. The court refused to sustain this defense. The court, in its opinion, said that:

> "The jurisdiction of courts of equity to interfere, and effectuate their own decrees by injunction, or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties, is well settled."
>
> Citing Story's Eq. Jur. p. 959, and a number of other authorities, including Krippendorf vs. Hyde, 110, U. S. 276, and Pac. RR. Co., vs. Mo. P. RR. C., 111 U. S. Rep. 505.

It is certain that if the complainants had succeeded in either of the two equity causes, Nos. 14,468, or 15,141, in declaring the tax title of the defendant Roller invalid and worthless, they could have asked the court to enforce the

decree of the court to that effect, under the direct authority of the case of Root vs. Woolworth, just cited. Scant consideration would have been shown to the appellee, Roller in such a case, because he would have been in the way of the court's decree, his rights and interests in the property, would have been destroyed by the decree, and he would have been treated as a trespasser.

IT IS SUBMITTED, THAT THOSE DECREES ARE BINDING ALIKE UPON THE COMPLAINANTS AND THE DEFENDANTS, IN THOSE TWO CAUSES, AND SHOULD BE ENFORCED AGAINST THE OTHER PARTIES, ADVERSE TO ROLLER, WHO WAS THE SUCCESSFUL PARTY.

THOSE DECREES WERE OBTAINED AFTER LITIGATION IN THE COURTS OF THE DISTRICT OF COLUMBIA, THAT HAS BECOME NOTED AND IT CAN NOT BE POSSIBLE THAT NOTHING HAS BEEN ACCOMPLISHED BY THEIR RENDITION, THAT THEY ARE MEANINGLESS AND THAT THE QUESTIONS, THAT WERE THOUGHT TO BE SETTLED BY THEM, CAN BE RE-LITIGATED AGAIN, AND AGAIN.

IV.

It is true that after the rendition of the decree, in Equity cause No. 15,141, dismissing the defendant, Roller, from the cause and making a final decree as to him—indorsed as a final decree by the judge of the court himself—yet that the court, some time afterwards, went further to appoint commissioners to make a partition of the lots involved in said causes, and later on, to enter a decree for the sale of the property in controversy, and it is claimed that some consideration is to be paid to these decrees.

These decrees were entered without controversy, because there was no one to oppose them and they may have

been entered as a matter of course, being proper in form and unobjected to. Whether the learned judge understood that it was the same case, in which he had held that the complainants were not entitled to a cancellation of the tax title, including the tax deed, and all other deeds connected therewith, which the complainants themselves, said was a cloud upon their title, does not appear. If it had so appeared, he perhaps would not have entered the decrees, for in the case of Willard vs. Willard, 145 U. S. Rep. 116 the court had held that in the partition of real estate in the District of Columbia,the title must be clear, to entitle the tenant in common to partition as a matter of right. See page 120 and authorities there cited. See, also, 2 Minor's Inst., title "Partition," and numerous authorities there cited.

But in addition to these authorities the record shows that in the final decree of June 17, 1893, in Equity cause No. 13,468, Judge Hagner decided—sustaining the defendant, Roller's first ground or demurrur—that a court of equity could not make partition of the real estate in controversy in that cause, until the title thereto, had been made clear, in said court of law, and that he put that finding in the decree itself.

THAT DECREE STANDS TODAY UNREVERSED AND IN FULL FORCE AND IS THE LAW OF THE LAND AS TO THE PROPERTY IN CONTROVERSY.

It appears, too, that the court of appeals of the District of Columbia was of the opinion that those decrees were rendered after Roller was dismissed from the cause, and that they were not binding upon him, because as to him, they were *coram non judice*, and as to this there can be no question.

It is submitted to your honors, therefore, with confidence, that the decree of the court of appeals of the District of Columbia was erroneous in failing to say in express

terms, that those decrees, as shown on the face of the decrees themselves, and by the proofs adduced, under the authority of Russell vs. Place, 94. U. S. Rep. 606, (establishing by intrinsic evidence that the question was raised and determined), sustained the validity of the tax title under which the appellee, Roller, claims, as unassailable, because of the lapse of time, the loss of evidence and the *laches* of the adverse claimants for more than half a century; and in not at once enforcing that finding in the present suit.

V.

It is submitted with confidence, that the court of Appeals of the District of Columbia should have decided as did Judge Hagner and Judge Cox, THAT THE FAILURE FOR OVER THREE QUARTERS OF A CENTURY, TO PAY TAXES, ON THE PART OF THE ALLEGED OWNERS, AND THE FAILURE FOR NEARLY A HALF A CENTURY, TO QUESTION THE VALIDITY OF THE TAX TITLE O FHE APPELLEE, ROLLER, IS SUCH EVIDENCE OF AN ABANDONMENT OF ANY CLAIM TO, OR RIGHT IN, THE PROPERTY, AND OF SUCH LACHES AND DELAY, ON THE PART OF SAID OWNERS AS TO PRECLUDE THEM FROM EVER OBTAINING ANY RELIEF WHATEVER AGAINST THE TAX TITLE, UNDER WHICH ROLLER CLAIMS AND CONSEQUENTLY FROM EVER ASSERTING ANY TITLE TO THE PROPERTY WHATEVER.

The answers filed in the cause, admit that the appellee Roller, and those under whom he claims, have paid the taxes and they pretend to say that the claimants have offered to reimburse him the taxes and assessments against the property, but they utterly failed to renew the offer in the answers and they neither brought the money into court nor

offered to pay it, and the pretense of such offer is emphatically denied.

IF INTEREST BE COUNTED UPON THESE TAXES AND ASSESSMENTS, IT IS BELIEVED, THAT THEY WILL FAR MORE THAN ABSORB THE VALUE OF THE PROPERTY.

The appellee, Roller, denies that the offer was ever made, but declares, that if it was, it can not affect the controversy here. He submits that, having paid for the property, in good faith, that he and those under whom he claims, having paid the taxes on it for over three quarters of a century, having successfully defended the property against all comers to this date, and successfully invoked the defense of *laches*, against the attack made upon the tax title, under which he claims he is entitled at the hands of your honors to that consideration which a law abiding and taxpaying citizen is entitled to receive.

That a defence, based upon the ground of *laches* and abandonment, is one which will be recognized and allowed by the courts, both of law and equity, is a proposition which is sustained by numerous and well considered decisions of the courts, throughout the whole land.

The first case, perhaps, in which this doctrine was announced is that of Ewing vs. Burnett 11 Peter's Rep. 41, in which it was said that—

> "On the evidence in the cause, the jury might have presumed a release, a conveyance, or an abandonment of the claim or right of Williams under a deed in virtue of which he had made no assertion of right in favor of a possession such as the defendant had from 1804, although it may not have been strictly such an adverse possession as would have been a legal bar, under the act of limitations."

In that case, the time during which Williams did not "claim the lot or assert a right to it," was only "from 1803 till his death in 1824," while the time during which the defendant claimed the lot under color of title was from 1804 to 1834; while he paid taxes on it only from 1810 to 1834. (See pages 49 and 51.)

It was held, also, in that case—

> "that the uninterrupted payment of taxes taxes on the land for more than twenty four successive years is powerful evidence of a claim of right to it."

How much stronger is the case presented in the record now before the court.

The latest case, in the Supreme Court of the United States, is that of Moran vs. Horsky, 178, U. S. Rep. 208, in which case, an abandonment for fourteen years was considered sufficient to bar any claim for relief, the court declaring, that—

> "we need only refer to the many cases, decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an *abandoned* right, which no court will enforce. There always comes a time when the best of rights will by reason of neglect pass beyond the protecting reach of the hands of equiy."

The court refers to Galliher v Caldwell 145, U. S. Rep. 368, in which case the land in controversy lay near the city of Tacoma, in the State of Washington. The claimant lived but forty miles from the land, and was presumed to have known something of the changes, going on around it. It lay contiguous to a city, beginning to grow rapidly in value, and it was platted as an addition to that city. The city had grown from a population of 1,000 in 1880, to a population of 36,000 in 1890, and that implied an enormous increase in property situated so as to be an addition to the city. The claimant waited but seven years, and only four

years after the issuance of a patent to another claimant. The court below applied the defence of *laches* to her claim, and the Supreme Court of the United States unanimously sustained the decree.

On page 372 the court, in its opinion, referred to a number of cases in which this defense was applied. In Harvard vs. Railroad Co., 17 Wall. 78, after a delay of five years; in Twinlick Oil Co., vs. Marbury, 91 U. S. Rep. 587, after a delay offouryears; in Brown vs. County of Beuna Vista, 95 U. S. Rep. 157 after a delay of seven years; in Hayward vs. Bank, 96 U. S. Rep. 611, after a delay of four years; in Holgate vs. Eaton, 116 U. S. Rep. 33, after a delay of two years in Davis vs. Davis, 125, U. S. Rep. 90, after a delay of five years

The court said:

> "But it is unnecessary to multiply cases. They all proceed upon the theory that *laches* is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; an inequity founded upon some change in the relation or condition of the property or the parties."

In Hammond vs. Hopkins, 143, U. S. 224, which was a case involving title to real estate in the city of Washington, and in which it appeared that there had been great changes in value and testimony had been lost, owing to the death of witnesses and loss of papers and there was an absence of any reasonable impediment or hindrance to the assertion of the alleged right, the court held:

> "A court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, and will refuse to interfere, where there

> have been gross *laches* in prosecuting rights, OR WHERE LONG ACQUIESCENCE IN THE ASSERTION OF ADVERSE RIGHTS HAS OCCURRED."

In Naddo vs. Burden, 4 U. S. Appeals, 642, the real estate involved lay near the city of Duluth; the rapid increase in the population of that city made it evident that the land in controversy must have wonderfully increased in value, and the court took judicial notice of the fact. In that cause after a delay of ten years, the court declared that the claimant had been guilty of such *laches* as would bar him from relief.

Justice Brewer delivering the opinion of the court in the case, declared:

> "No doctrine is so wholesome, when wisely administered, as that of *laches*. It prevents the resurrection of stale titles, and forbids the spying out from the records, of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claim. It gives to the actual and long possessor, security, and induces and justifies him, in his efforts to improve and make valuable his property. It is a doctrine received with favor because its proper application works out justice and equity and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it, when its enforcement will work large injury to many."

The court quotes the case of McQuiddy vs. Ware, 20 Wall. 14, in which there was a delay for six years only on the part of the claimant, who insisted that judicial proceedings had against him during the war, while he was at the time in the Confederate States, were invalid, and ineffectual

as to him, and yet the delay, unexplained, was held sufficient to deny him the aid of the court of equity.

The courts have leaned, too, in aid and support of tax title, *such as this, involved in the present case.*

In Thompson vs. Carroll, 22 How. 422, it was held that where the owner of a tax title, has had possession of the property in controversy, paid taxes, built and made valuable improvements on the same, for nearly twenty years, a court of justice should not exercise judicial ingenuity, to forfeit even a tax title, when the former owners have been slow to question its validity.

In Cornet vs. Williams, 20 Wallace, 230, the Supreme Court of the United States declared that:

> "As regards public officers, acts done which presuppose the existence of other acts to make them legal and operative, are presumptive proof of the latter. In the case of Ward's Lessee vs. Barrows 2 Ohio, St. Rep. 247, a sale for taxes came under examination. It was held, that certain acts of the county auditor, were presumptive proof that he had administered to the collector the oath prescribed by law, touching the delinquent list. The sale was sustained. The judge who made the order of sale, was the judge to approve the claim. The order was presumptive proof, of the requisite approval."

In the case of Keene vs. Demarest, 21 Calif. Rep. 300, it was held that an assessment could not be presumed nor could a tax deed itself, be presumed, but that the presumptions of law, which Greenleaf says, applies to all sales, or other official procedure, after the lapse of thirty years did apply, to all the intermediate steps between the assessment and the tax deed, and that the presumption was, that the requirements of law had been complied with, after a reason-

able lapse of time had taken place, so that a fair presumption had arisen, that there had been some loss of papers, records or other evidence, quoting the doctrine as laid down in 1 Greenleaf on Evidence, p. 19 and 20, fixing the period of time which must have elapsed in most cases "at thirty years."

The failure on the part of the owner to pay the taxes assessed against the property, and the payment of the same by the claimant, asserting title thereto, and in whose name also, the real estate had been assessed for a long period of time, is powerful evidence of a claim of right to the property.

See Fletcher, 120 U. S. 553.
Ewing vs. Burnett, 11 Peters, 41.

The supreme Court of the United States has said also.

> "that the payment of taxes, is an important and strong evidence, of a claim of title, and the failure of the record owner, to make claim to the property, or to pay the taxes themselves, is evidence of an abandonment of any right in or claim to the property."

See Holtzman vs. Douglas, U. S. Sup. Court, 166, U. S., Report278.

In this case of Holtzman against Douglas, such payment of taxes by a claimant under a tax title only continued from 1867 to the 31st of May, 1879.

In the case at bar the alleged owners have failed for over three quarters of a century to pay any taxes on the property in controversy, and there can not be any question about the fact that they had abandoned the property to the appellant, Roller, and those under whom he claimed.

In Underwood vs. Dugan, 130, U. S. 284, in applying the doctrine of *laches* in that case, the court said:

> "The doctrine of *laches* rests on no arbitrary or technical rule. It is founded on the

plainest principles of substantial justice. Ownership of property implies two things: First, attention to it; second, a discharge of all obligations by taxation or otherwise, to the the state which protects it. When it appears that one who now asserts title to the property arising more than the lifetime of a generation ago, has during all these years, neglected the property and made no claim of title thereto, the reasonable presumption is that no title was in fact obtained, or, if that be not true, that he considered the property of such little value that he abandoned it to the State which protected it. So, if the title being beyond challenge, during these years he paid no taxes thereon, makes no effort to improve or increase its value, and, by the labor and efforts of others, under the protecting power of the State, large value has been given to it, the State may properly say to him as may also the individuals who have thus wrought this change in value, you abandoned the property when it was comparatively valueless, you have taken no share in the burdens of taxation, or the support of the State; others have toiled, paid taxes and made the property valuable; therefore, because of your shirking of duties and obligations, you shall not, whatever may have been the nature of your title in the first instance, be permitted to appropriate the value thus produced by others."

See also the very recent case of Patterson vs. Hewitt, 195. U. S. Rep. 317.

In the case before thecourt, after the lapse of over 80 years, under the circumstances, already set forth in the

first part of this brief, to which the courts attention is again called most earnestly the doctrines of laches, of abandonment, of want of equity in view of the changed condition of the property involved and of the parties asserting title to the same, and the loss of evidence are all pressed upon this court, in this case— which, it is submitted is the strongest case that was ever presented, for their application.

VI.

But a still further question arises, as an obstacle, in the path of the appellants, Clark and wife, and Walker. Not only must the question be answered, "Can the attack which is made after the lapse of so many years upon the tax title of the 6th of March, 1852, be sustained," but the still more significant question, "IS IT WELL FOUNDED?"

The only point which is made in the amended bill of complaint, filed in the cause against the validity of the tax title is that

> "The officer or officers of the corporation of the City of Washington did not within ten days after the supposed sale of said lot for taxes or at any time transmit to the clerk of the late Circuit Court of the District of Columbia, an accurate report, or any report in writing, certified by the clerk or register of the said corporation in manner and form, as required by sec. 2, of act of Congress approved February 20th, 1819, nor was such report, or any report, in the premises forthwith, or at any time, recorded by the said clerk, or by any one else among the land records of said county."

It is admitted that under a decision of the former supreme court of the District of Columbia reported in one of Mackey Reports, it was said, that inasmuch as no report of tax sales could be found in the office of the recorder of deeds; and in as much as the statute, as it then appeared in the compilation of the statutes supposed to be in force in the District, required that such reports should be made to, and recorded in said recorders office, the tax deed in that case was invalid. Yet a reference to the cases in the Supreme Court of the United States will show that the decision referred to, has no application to the deed to Richard Barry of March 6th, 1832, in the present case, but that deed, must be governed by the law, as it stood, "in ye old time."

The cases in your honors Court involving the validity of tax titles, in the District of Columbia were

1. Mason vs. Pearson, 9th Howard, page 232.
2. Early vs. Howard, 16th Howard, page 610.
3. Thomas vs. Carroll, 22 Howard, page 622.
4. Ronkendorf, vs. Taylor 4th Peters, 349.

and they all show that although "there were giants in those days." who appeared as lawyers in these cases, no question was ever raised by them as to the REPORT OF SALES NOT BEING RETURNED TO THE RECORDER'S OFFICE, nor was any reference made to such requirement of the court, although in the case of Thompson vs. Carroll the tax title was sustained.

It is submitted that there was then, in fact, no law requiring such report to be made to the recorder's office, and there was then in fact no such officers, as former tax laws of 1819, recognized and referred to.

The City of Washington was by the act of May 4, 1812, amending the preceding acts—May 3, 1802 chapter 53 and February 24, 1804. chapter 14, and May 4, 1812., chapter 75 incorporated, by the name and style of "the mayor,

alderman, and common council of the city of Washington." (2 U. S. Stats. at Large, pp. 721, 727. ch. 1, 9.

The corporation was given full power to lay and collect taxes, and unimproved lots in the city of Washington on which two year's taxes remained due and unpaid, etc., were authorized to be sold at public sale for such taxes due thereon (id. 8). By an amendatory act Congress enacted "that the several collectors of the said taxes, or such other officers of the said corporation, as shall be charged with the duty of selling any such real estate, for taxes, shall within ten days after every such sale, transmit to the clerk of the circuit court for the county of Washington, an accurate report in writing certified by the clerk, or register of thesaid corporation, containing &c.," (certain specified information), "which report it shall be the duty of the clerk of the said court forthwith to record, &c."

Act of February 20, 1819, ch. 35, 2.
3 U. S. Stats. at Large, p. 486.

It is claimed by the appellants Allen C. Clark and wife, in their amended bill, in the court below, that no such report was ever transmitted, filed, or recorded, and they claim, that that omission, rndered the tax title, void.

It will appear however, that the act requiring such a report to be made to that office had been repealed long before and was not in force when the tax sale in the case at bar, took place.

About a year after the passage the act of February 20, 1819, Congress repealed the then existing act, incorporating the city of Washington, and all the supplements and amendments to the same, and incorporated the said city under the new name of the "mayor, and *boardof Aldermen*, and*board of common council*, of the city of Washington." giving the new corporation, an entirely new and complete charter, with full and ample powers of all kinds, including the power to lay and collect taxes, and to sell real property,

whether improved or unimproved, in the city of Washington on which two or more year's taxes should have remained due and unpaid, &c., but requiring no such report to be transmitted or certified or recorded. (Act of May 15, 1820, ch. 104, 1, 2, 7, and 10. of U. S. Stats at Large pp. 583, 586, and 587).

Lastly Congres passed the act of May 26, 1824, which did not require any report to be transmitted, certified or recorded but repealed in section 1 "so much of the act of May 15, 1820, chapter 104, as is inconsistent with the provisions of this act." and enacted:

Sec. 3. "That public notice of the times and place ,of the sale of all real property for taxes due the corporation of the city of Washington,, shall be given in all cases hereafter, by advertisement, inserted in some newspaper, published in the said city, once a wek, for at least twelve successive weeks, in which advertisement shall be stated the number of the square, or squares, the number of the lot, or lots, (if the square has been divided in lots) the name or names of the person, or persons, to whom the same may be assessed on the books of the corporation, at the time of such advertisement, the amount of the tax due on each square, or lot, the period for which the same shall be due, and the aggregate amount of taxes, due on all real property assessed in the name of the same person, or persons, &c., and no sale of real property, for taxes, hereafter made, shall be impaired, or void, by reason of such property not being assessed or advertised, in the NAME, or NAMES of THE LAWFUL OWNER or OWNERS, THEREOF, PROVIDED thesame shall be advertised as above, directed, or by reason of the amount of taxes due thereon, not being correctly stated."

Sec. 6. "That the proprietor or proprietors of lots, which may be sold, under the provisions of this act, shall be allowed the right of redemption in the same manner, and

according to the like restrictions, contained in the act, to which this is a supplement."

Sec. 8. "That if, before the day of sale, advertised as aforesaid, the owners, his agent, or attorney, shall not pay theamount of taxes, with all costs thereon assessed, said lots, &c., shall be sold, &c., and if at the expiration of twelve months from the day of sale, the owner shall not appear, and pay, &c., the amount of the purchase money, and costs and taxes accruing subsequent to the sale and ten per centum interest, per annum, on the purchase money, it shall and may be lawful for a title in fee simple, at the expiration of said time, to be made to the purchaser."

Sec. 11. "That all titles to property conveyed as aforesaid, on sales for taxes, &c., &c., shall be by deed from the mayor, under the seal of thecorporation; which said conveyance shall be effectual, in law, to convey the title, the requisitions of this act, having been compiled with."

Act of May 26, ch 195, 1, 2, and 11.

4 U. S. Stats at Large pp. 75, 76, and 77.

We respectfully submit that, the old corporation and its officers, designated in the act of February 20, 1819, having been legislated out of existence, there was no one to whom to transmit, or certify the report provided for, by that act, and no clerk or register by whom it could be recorded and further, that even if such was not the case, the act of May 26, 1824, supra, by its broad provisions, did away with the necessity or transmitting, certifying, or recording any such report, and, in fact, repealed the act of February 20, if it had not been previously repealed, as it is submitted, it had.

It appears, however, that such reports of sale were in fact made and they were returned to the register of the District. (See Mason vs. Fearson, 9th Howard, 248) and were recorded in the official "sales book," a book kept for that purpose and that book should be in existence today in the

proper office and not only, is ths the fact but in the case of Thompson vs. Carroll, 22nd Howard, page 422, with those same great lawyers before the Court a tax sale made in 1835, was sustained, which never could have been done if the court had not thought or held, that the making of the report to the Register, and the record thereof, in the "official sales book" was a compliance with the law.

Upon these authorities it is submitted that the tax deed to Richard Barry is a valid deed—and that it should have been so held in all the courts below—upon the following grounds to wit: First: These lands were assessed for taxes—the assessment books should easily be found in the Collector's office—Second: They were duly advertised for the failure to pay taxes—"the "National Intelligencer," to be found in the room next to the law library, of the Bar Association of the District of Columbia, from July to December, 1847, no doubt shows an advertisement for 184 days; and that the dollar mark was used; and as to the only defect pointed out made against the tax title the "official sales book" which should be in existence in the Collector's Office would show that the sale was reported to the Register of the City in place of the "clerk of the Circuit Court of Washington," which office had been legislated out of existence by the act of 1824 and that this report which was recorded in the official sales book was deemed by this court to be a sufficient compliance with the law inasmuch as it appears that it has sustained a similar tax sale.
it appears that it has sustained such a tax sale.

Surely this court will not overturn its own decisions which have been acquiesced in as the law of the land, for these many years, at the suggestion of the appellants everyone of whom had no interest in the proprietary title, until they bought up the same and with full knowledge of the condition of the title,—after spying out the same— from the records and who have used the title thus acquired by

them as a basis for the institution of their suit and who may be justly charged therefore, as being mere speculators in these old titles. Surely no lawyer of later days will persuade your honor to hold that there has been a fatal defect in complying with the law of tax sales, in the District of Columbia when the great lawyers of former days—men of the greatest skill and learning in their profession, and of the highest character for integrity and honor—failed to discover or to rely upon such defect, and the court has sustained such a tax sale.

VII.

But as a final consideration in favor of the appellee, John E. Roller, which will compel your honors to hold that his title to the property in controversy is valid and unassailable. and that any decree to make partition of thesame, is a cloud upon his title, indefeasible as it has now become, your honors are refered to section 999, of the Code of Law for the District of Columbia, p. 178, Title—

> "Adverse Possession.—In an action to recover vacant and unimproved lots of ground it shall not be necessary, in order to maintain the defense of adversary possession to show that the premises in controversy had been inclosed; but if it appears that the property had been assessed for taxation to the defendant, or those under whom he claims and he or they had regularly paid the taxes on the same and were the only persons who had exercised control over the same for a period of fifteen years before the bringing of the action, such facts shall be the equivalent of possession by actual inclosure."

It is submitted to your honor, upon the merits under the proofs in the cause, that thetitle of the appellee, John E. Roller, to the lots in controversy ,is perfect and unassailable, and that a decree should be rendered to that effect, thus ending forever this protracted litigation.

1st. Under the tax title now a half a century old the defense of which has been successfully made in the court below, in both of the equity causes above referred to.

2nd. Under the law of tax sales, in force in the District of Columbiafi at the time of said sale in compliance with which that tax title was made and under which is a valid and perfect one as against the only defect alleged against it as the bills of complaint filed in this cause.

3rd. Under the doctrine of *laches* and abandonment, so often sustained by the courts against the record owner, in favor of those who have claimed the property, either under a tax title, or some other claim of title and who have borne the heavy burthen of taxation and ownership, for many years.

4th. Under the law of adverse possession, as defined and limited in the new Code of the District of Columbia, Sec. 999, cited above, and the proofs adduced in the record, which show a payment of taxes not for fifteen years, but for fifty, and a control exercised over the property in controversy for the same period, or as proven by Roller himself. since 1875

And that being so all the other decrees of the courts below, must be reversed, the decrees of June 17, 1893, and May 5, 1896, enforced, any further proceedings to partition said property, as between the parties to the Cause No. 15,-141, other than said Roller, forever enjoined, and the appellee Roller, quieted in his possession and ownership of the same.

In brief, your honors are asked to put an end to this

protracted litigation as a matter of simple justice to appellee.

O. B. Roller,
D. S. Mackall.
For Appellant.